No. 83-317

In the Supreme Court of the United States

OCTOBER TERM, 1983

SHERMAN BLOCK, SHERIFF OF THE COUNTY OF LOS ANGELES, ET AL., PETITIONERS

v.

DENNIS RUTHERFORD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the district court failed to comply with *Bell* v. *Wolfish*, 441 U.S. 520 (1979), in requiring petitioners to permit contact visits for low risk pretrial detainees incarcerated more than 30 days at the Los Angeles County Central Jail.

2. Whether the district court erred in holding that pretrial detainees at the Los Angeles County Central Jail are constitutionally entitled to be present during general searches of their cells.

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INTEREST OF THE UNITED STATES

This case involves a constitutional challenge to two practices of the Los Angeles County Central Jail: denying contact visits to pretrial detainees and refusing to allow pretrial detainees to be present during searches of their cells. The Bureau of Prisons administers 43 correctional institutions, of which nine house persons detained pending trial on federal charges. Any decision by this Court concerning the constitutional rights of pretrial detainees in state facilities will necessarily have implications for federal pretrial detainees. In addition, the United States

has enforcement responsibilities under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. (Supp. V) 1997 *et seq.*, to assure that state prison officials do not deprive inmates of the rights, privileges or immunities secured or protected by the Constitution and laws of the United States.

STATEMENT

In 1975, pretrial detainees at the Los Angeles County Central Jail brought a class action under 42 U.S.C. (Supp. V) 1983 and 1985 challenging the conditions of their confinement (Pet. App. 1). The district court entered judgment for the plaintiffs. The county implemented nine of the changes ordered by the district court, and appealed the remaining three—including the court's requirement that the jail allow contact visits for pretrial detainees identified as low risks who have been incarcerated more than 30 days, and its requirement that the jail permit inmates to be present during general searches of their cells (*id.* at 1-2).

In an unpublished memorandum decision, the Ninth Circuit remanded the case for the district court's reconsideration in light of this Court's decision in *Bell* v. *Wolfish*, 441 U.S. 520 (1979) (Pet. App. 1-2). On remand, the district court reaffirmed its previous order as to the three challenged conditions (*id.* at 23-28). The county again appealed, and on July 14, 1983, the Ninth Circuit affirmed the district court on the contact visit and cell search issues (with one judge dissenting on the latter question), and reversed on the third issue (reinstallation of transparent windows in the cells) (*id.* at 1-17).

The Los Angeles County Central Jail is a 5,000 inmate facility used primarily to house men awaiting trial on criminal charges (Pet. 2). The jail's visiting

facilities consist of 228 separate cubicles where inmates and visitors are separated by a sheet of glass and use telephones to speak to each other (Pet. App. 49-50). Visits are limited to twenty minutes, and the jail accommodates 63,000 visitors per month (*id.* at 50). Petitioners have categorically rejected any proposal to alter this arrangement to permit contact visits, even on a limited basis, because they claim it would compromise the security of the institution (*id.* at 26).

The district court concluded that the jail's absolute ban on contact visits is an overreaction to security risks (Pet. App. 26), and it ordered petitioners to make one weekly contact visit available to each pretrial detainee in custody for one month or more "concerning whom there is no indication of drug or escape propensities" (*id.* at 23). The court further provided that the jail could limit the total number of such visits to 1,500 per week (*ibid.*).[1]

In affirming this aspect of the district court's order, the Ninth Circuit recognized that, while contact visitation is not constitutionally mandated for all detainees in all facilities, "[a] blanket restriction on contact visits for all detainees may present an unreasonable, exaggerated response to security concerns at a particular facility" (Pet. App. 8). The court of appeals concluded that petitioners' refusal to allow contact visits was an exaggerated response to security concerns, and held that the district court had properly accommodated " 'institutional needs and objectives and the provisions of the constitution that are

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[1] The district court did not explain how it arrived at the 1,500 visit ceiling. The total number of visitors at the jail each week is 15,000 (Pet. App. 6 n.3).

of general application'" (*id.* at 6 (quoting *Wolfish*, 441 U.S. at 546)).

With one judge dissenting (Pet. App. 15-17), the Ninth Circuit also affirmed the district court's order requiring the petitioners to allow inmates to observe general searches of their cells (*id.* at 8-12). The Ninth Circuit distinguished this Court's rejection of the identical constitutional claim in *Wolfish* by noting that the district court here took account of security concerns ignored by the lower courts in *Wolfish* (*id.* at 10), and by reasoning that the district court here premised its relief on due process concerns (preventing improper confiscation of an inmate's property) rather than on the Fourth Amendment grounds rejected as insufficient in *Wolfish* (*id.* at 11-12).

SUMMARY OF ARGUMENT

This case presents two questions concerning the proper application of the standards recently articulated by this Court in *Wolfish* for evaluating the constitutional claims made by pretrial detainees challenging their conditions of confinment. On the first question, the Ninth Circuit correctly recognized that contact visitation is not constitutionally mandated for all detainees in all facilities (Pet. App. 8), but we believe that in affirming the district court's requirement of a limited number of contact visits for Los Angeles County Central Jail inmates, the court of appeals failed to accord to the security-related judgment of corrections officials the deference required by *Wolfish*.

The Ninth Circuit's resolution of the second issue —the right of an inmate to be present during a cell search—is squarely at odds with *Wolfish*'s holding to the contrary on virtually identical facts. Accordingly, we support petitioners in urging this Court to reverse.

ARGUMENT

I. PETITIONERS' BAN ON CONTACT VISITS FOR PRETRIAL DETAINEES IS A CONSTITUTIONALLY PERMISSIBLE EXERCISE OF DISCRETION TO ASSURE INSTITUTIONAL SECURITY

In our view, the question presented here is not the desirability of contact visits generally, nor whether allowing such visits is more "reasonable" than a contrary policy.[2] Rather, the question is whether weekly contact visits are constitutionally mandated.[3]

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[2] The Federal Bureau of Prisons permits unlimited attorney/client contact visits and generally allows supervised social contact visitation throughout its institutions for both convicted persons and pretrial detainees, with the exception of its facility at Marion, Illinois, where the Bureau has terminated social contact visits for all inmates in response to two recent murders of staff. In addition, the *Federal Standards for Prisons and Jails* promulgated by the Department of Justice in 1980 provide (¶ 12.12, at 113):

> Visiting facilities [should] allow for physical contact between inmates and the visitors of their choice except in those specific instances where there is a reasonable belief that such a procedure would jeopardize the safety or security of the facility.

[3] The courts of appeals appear to be split on the question whether there can ever be a case where the refusal to accord contact visitation to a pretrial detainee amounts to a constitutional violation. See, *e.g.*, *West* v. *Infante*, 707 F.2d 58 (2d Cir. 1983) (trial court erred in dismissing for failure to state a claim where pretrial detainee alleged unconstitutional denial of contact visits); *Jones* v. *Diamond*, 636 F.2d 1364 (5th Cir.), cert. granted *sub nom. Ledbetter* v. *Jones*, 452 U.S. 959, cert. dismissed, 453 U.S. 950 (1981) (incarcerated persons awaiting trial may, in some circumstances, be constitutionally entitled to contact visits); *Ramos* v. *Lamm*, 639 F.2d 559, 580 (10th Cir. 1980) (unlimited contact visits not required where limited contact visits were provided); *Jordan* v. *Wolke*, 615 F.2d 749, 751, 753-754 (7th Cir. 1980) (refusal to grant con-

In *Wolfish* this Court held that, under the Due Process Clause, unconvicted pretrial detainees may not be subjected to punishment or to conditions of confinement that amount to punishment.[4] Whether a particular restriction on pretrial detainees withstands constitutional scrutiny, therefore, depends upon whether that restriction is imposed "for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose" (441 U.S. at 538).

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tact visits upheld where 95% of inmates are detained fewer than 30 days and contact visitation would require construction of new facilities and hiring additional guards); *Inmates of Allegheny County Jail* v. *Pierce*, 612 F.2d 754, 758-760 (3d Cir. 1979) (denial of contact visits upheld where costly and extensive security measures would be necessary if they were permitted).

Because of the Federal Bureau of Prisons' policy allowing contact visits, we did not challenge the Second Circuit's holding in *Wolfish* that pretrial detainees have a constitutional right to contact visits. 441 U.S. at 560 n.40. In upholding the federal practice of strip searching detainees following contact visits, however, this Court suggested that any constitutional infirmity in the strip search procedure could be eliminated by "abolish[ing] contact visits altogether." 441 U.S. at 558-560 & n.40.

[4] As the Court explained (441 U.S. at 535-537):

> In evaluating the constitutionality of conditions or restrictions of pretrial detention * * * we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law * * *. [T]he Government * * * may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment * * *.

This Court plainly indicated that the federal judiciary is not to apply a strict or heightened scrutiny analysis in making the above determination. "[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate [nonpunitive] governmental objective," such as institutional security, "it does not, without more, amount to 'punishment' " (441 U.S. at 539). And, "in the absence of a showing of intent to punish," a court "permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees" only where the restriction "is arbitrary or purposeless" or lacks "a legitimate nonpunitive government objective" (*id.* at 539 & n.20).

Petitioners maintain that the need to safeguard the security of Los Angeles County Central Jail requires a complete ban on contact visits for all inmates. Respondents assert that such a policy infringes upon rights secured by the Due Process Clause.[8] Thus, the task of the courts below was to determine whether a ban on contact visits is "reasonably related" to the goal of maintaining jail security. *Wolfish*, 441 U.S. at 540-41 n.23 (quoting *Pell* v. *Procunier*, 417 U.S. 817, 827 (1974)). This Court has repeatedly cautioned that "[i]n determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that '[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence

[8] Respondents have not, to the government's knowledge, suggested an alternative constitutional source for their claimed right to contact visitation.

of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.' " *Wolfish*, 441 U.S. at 540-541 n.23 (quoting *Pell* v. *Procunier*, 417 U.S. at 827). Federal courts, in short, are obligated to give "wide deference" to the expert judgment of corrections officials (441 U.S. at 547) unless they are " 'conclusively shown to be wrong' " (441 U.S. at 555, quoting *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, 132 (1977)).

Petitioners contend, and we agree, that the court below failed to accord the appropriate deference to petitioners' judgment concerning jail security. The visitation policy adopted by state officials in this case is not arbitrary or purposeless; there is no substantial evidence in the record to indicate that the policy is an exaggerated response to security concerns. *Bell* v. *Wolfish*, therefore, requires reversal.

The prohibition on contact visits that is at issue here serves several legitimate, non-punitive objectives. The prohibition, of course, is primarily designed to further "the central objective of prison administration, safeguarding institutional security." *Wolfish*, 441 U.S. at 547. See also *Jones* v. *North Carolina Prisoner's Labor Union*, 433 U.S. 119, 132 (1977); *Pell* v. *Procunier*, 417 U.S. at 822; *Procunier* v. *Martinez*, 416 U.S. 396, 412-414 (1974). The district court properly recognized that the proscription frees jail personnel from the "complicated, expensive and time consuming process" of constantly monitoring inmates and their visitors (Pet. App. 31). The policy also obviates the necessity of intrusive security measures, such as the strip and body cavity searches of detainees that the district court found would be a

necessary incident of contact visits (*ibid.*). Moreover, a change in policy would require the construction of a "large and secure visiting area" (*id.* at 31), although the district court theorized that "[m]odest alteration within the jail presumably could provide appropriate space" for a limited number of contact visits (*id.* at 33). Finally, and most importantly, the district court noted that petitioners' ban on contact visits prevents a number of serious security problems —including "the importation of narcotics * * *, the increased possibility of the introduction of weapons and * * * escape attempts with the taking of hostages" (*id.* at 31-32)—that cannot be alleviated "despite all safeguards and precautions" (*id.* at 31).[6]

As the above findings of the district court illustrate, the prohibition of contact visitations in this case is hardly "arbitrary or purposeless," but is rather a "reasonable response * * * to legitimate security concerns." *Wolfish*, 441 U.S. at 561. Nevertheless, despite its acknowledgement that "many factors strongly militate against the allowing of contact visits" (Pet. App. 32), the district court held that petitioners' ban on such visits is constitutionally impermissible. It did so solely because its own perception of "[w]hat is reasonable under the circumstances" (Pet. App. 25) led it to conclude that the

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[6] Obviously, restricting contact visits to "low security risk" detainees, as ordered by the courts below, does not eliminate the possibility that those persons could be enlisted, voluntarily or involuntarily, to secure weapons, narcotics, or other contraband for higher risk fellow detainees. Moreover, the Bureau of Prisons does not classify pre-trial detainees according to risk, largely because such a task is unfeasible prior to the preparation of a pre-sentence report. There is, therefore no reason to believe that state officials could even segregate "low risk" detainees, as assumed by the lower courts here.

security problems created by contact visits would not be "intolerable" (*id.* at 26) if such visits were limited to "low security risk" detainees who had been incarcerated for more than 30 days (*ibid.*).

This analysis, approved by the court of appeals, clearly misapplies the standard mandated in *Wolfish*. The district court's determination (Pet. App. 32) that "many factors strongly militate against the allowing of contact visits" should have ended its inquiry. Such a finding demonstrates that the jail administrators' ban on contact visits is reasonably related to legitimate objectives and thus is constitutionally permissible. Corrections officials are not obligated under the Due Process Clause to pursue their security objectives in the least restrictive manner. *Wolfish*, 441 U.S. at 542-43 n.25, 554, 559-560 n.40. Courts simply may not substitute their judgment for that of expert corrections officials because, in their view, security problems can be adequately mitigated through less intrusive procedures. 441 U.S. at 546-547, 557, n.38. "[P]roper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the * * * rights of the detainees." 441 U.S. at 557, n.38.

Unless the actions of corrections officials are shown to be arbitrary or irrational, the balancing of institutional security concerns and detainee rights that was undertaken by the lower courts in this case (Pet. App. 6, 26) is to be left within the discretion of corrections officials. As in *Wolfish*, 441 U.S. at 554, the lower courts in this case:

> have trenched too cavalierly into areas that are properly the concern of [corrections] officials. It

is plain from their opinions that the lower courts simply disagreed with the judgment of [the corrections] officials about the extent of the security interests affected and the means required to further those interests. But our decisions have time and again emphasized that this sort of unguided substitution of judicial judgment for that of the expert prison administrators on matters such as this is not appropirate. See *Jones* v. *North Carolina Prisoners' Labor Union*; *Pell* v. *Procunier*; *Procunier* v. *Martinez*. We do not doubt that the rule devised by the District Court and modified by the Court of Appeals may be a reasonable way of coping with the problems of security, order, and sanitation. It simply is not, however, the only constitutionally permissible approach to these problems.

II. THE DISTRICT COURT ERRED IN HOLDING THAT PRETRIAL DETAINEES HAVE A CONSTITUTIONAL RIGHT TO BE PRESENT DURING GENERAL SEARCHES OF THEIR CELLS

In *Wolfish*, this Court held in clear and unambiguous terms that searches conducted outside the presence of inmates, including pretrial detainees, do not violate the Fourth Amendment. 441 U.S. at 556-557. The Court further observed that, even assuming that the guards conducting the searches might on occasion damage or destroy the inmate's property, the remedy for such a due process violation is an action for damages, and not imposition of a constitutional requirement that inmates be present for the search. 441 U.S. at 557 n.38.

The district court here was presented with precisely the same constitutional claim regarding cell searches as that rejected by this Court in *Wolfish*. In reaching a contrary result, the district court asserted that, in ordering that pretrial detainees be

present during cell searches, it had accommodated security needs overlooked by the lower courts in *Wolfish* (Pet. App. 27). Second, the district court stated that it found the constitutional right to be present during cell searches to be grounded in the Due Process Clause rather than the Fourth Amendment (*id.* at 27-28). However, as the dissenting opinion in the Ninth Circuit makes clear (Pet. App. 15-17), neither of the district court's distinctions between this case and *Wolfish* survives analysis.

In fact, the district court in *Bell* v. *Wolfish* weighed the identical security concerns addressed by the district court here. See *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 148-149 (S.D.N.Y. 1977). The due process distinction relied upon by the courts below is equally untenable. This Court explicitly rejected a due process foundation for the right to be present during cell searches in *Wolfish*. 441 U.S. at 560-561 ("Nor do we think that the four MCC security restrictions [including cell searches] constitute 'punishment' in violation of the rights of pretrial detainees under the Due Process Clause of the Fifth Amendment."). Moreover, this Court acknowledged that, while seizures or destruction of property during cell searches might give rise to due process claims, "proper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting * * * the property rights of the detainees" (441 U.S. at 557 n.38).

Where, as here, this Court has provided clear and controlling guidance as to the constitutionality of a given prison practice and corrections officials have relied on that guidance, a contrary ruling in the courts below creates substantial and unwarranted confusion. Accordingly, this Court should reverse the holding be-

low that pretrial detainees are constitutionally entitled to be present for searches of their cells.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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